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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 117

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., LOUISIANA POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY,

Petitioners,

—v.—

RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE, and ORVILLE L. FREEMAN, Secretary of The United States Department of Agriculture,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 20, 1966

(*continued on inside cover*)

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No. 1276

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ARGUMENT

Respondents' brief in opposition to the petition for a writ of certiorari fails to address itself to the questions which are presented in this case and which petitioners are asking this Court to consider. Instead, it discusses this case in terms of

a question which has been framed in an effort to convince this Court that petitioners are foreclosed by authorities which are not dispositive of the real issues which form the basis of the petition. Respondents seek to avoid the precise issues presented by urging that this case only involves an attack on a proposed loan by the Rural Electrification Administration to finance the construction of facilities which will be used to compete with petitioners. This is not the issue. Legal wrongs against petitioners were committed by the Administrator, and these wrongs form the basis for their claim to the right of judicial review.

Petitioners have asked this Court to review the question of whether the Administrator of the Rural Electrification Administration, or any other administrator, may declare to a party that he will deal with him pursuant to his own regulation, in an effort to extract from him favorable concessions, but still be free to ignore the regulation arbitrarily and capriciously after the party has acted in accordance therewith.* Notwithstanding the obvious general importance of this question, respondents have devoted to it but a single paragraph.**

Respondents reason that since petitioners have no authority to enforce the Rural Electrification Act, they are powerless to question the Administrator's violation of his regulation which directly and adversely affects them, although respond-

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* Petitioners feel that the other questions presented in their petition need no further amplification here.

** At page 10 of their brief, respondents state: "Nor can the necessary standing be supplied by the procedures prescribed in REA Bulletin 111-3 (Pet. 8-10). The bulletin sets out procedures to be followed in administering the lending program authorized by the Act. Competing power companies have no right to enforce the terms of the Act itself; they obviously have no greater rights with respect to the bulletin."

ents recognize that the regulation sets out procedures to be followed in administering the lending program authorized by the Act, and although the regulation clearly contemplates the direct participation of petitioners in those procedures. This viewpoint makes a mockery of the regulation; a tool to be used by the Administrator to secure reasonable proposals from private suppliers, or to be ignored if he really does not wish to reach an agreement, regardless of the reasonableness of the proposals submitted. If respondents' position is correct, it must be concluded that: (1) an administrator's regulation has no binding effect, contrary to this Court's pronouncements in *Vitarelli v. Seaton*, 359 U.S. 535; *Service v. Dulles*, 354 U.S. 363; and *Accardi v. Shaughnessy*, 347 U.S. 260; and that (2) basic fairness is not required in dealings between administrators and the public, contrary to *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964).

The Administrator represented to petitioners that in his negotiations with them he would adhere to his regulation.* In doing so, the Administrator bound himself to negotiate with them for power supply proposals pursuant to the standard of

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*The regulation provides that:

"* * * Where the Administrator finds existing or proposed contracts with private suppliers are unreasonable for purposes of the Rural Electrification Act, the supplier under such contracts or proposals will be advised wherein they are unreasonable, and REA will endeavor to have the contracts or proposals made reasonable. * * *" and that:

"* * * No loan for generation or transmission facilities will be made except * * * upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is * * * (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator. * * *" (Petition, 29, 30, 31).

reasonableness embodied in the regulation. The district court found that the proposals of petitioners which were submitted pursuant to the procedures required by the regulation were reasonable in every respect as to which they could legally contract, and the court below did not conclude otherwise.

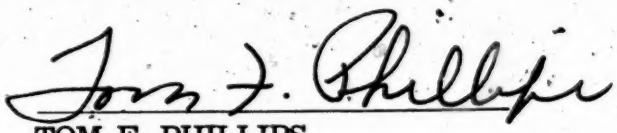
Whether the Administrator's breach of his regulation is subject to judicial review by petitioners is an issue of general importance. None of the authorities cited by the court below or by respondents concerned this issue. *Northern States Power Company v. Rural Electrification Administration*, 248 F. Supp. 616 (D. Minn. 1965), which was cited in support of the petition for a writ of certiorari, is in direct conflict with the decision below. Since the petition was filed, that case was appealed to the United States Court of Appeals for the Eighth Circuit. It is not anticipated that the Eighth Circuit will decide this question prior to the time that this Court would ordinarily consider this petition. Petitioners ask that the possibility of conflict between the decision of the Eighth Circuit and that of the court below on this vital question be considered by this Court, together with all other reasons advanced by petitioners, in acting on their petition.

CONCLUSION

For the reasons set forth in the petition, as amplified herein, the petition for a writ of certiorari should be granted and the judgment of the court below should be reversed.

September 20, 1966

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21 day of September, 1966, I served copies of this reply brief on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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